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# In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 521

FRANKS BROS. COMPANY, PETITIONER

*v.*

NATIONAL LABOR RELATIONS BOARD

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT*

## BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

### OPINIONS BELOW

The opinion of the court below (R. 112–122) is reported in 137 F. (2d) 989. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 3–28) are reported in 44 N. L. R. B. 898.

### JURISDICTION

The decree of the court below (R. 122) was entered on July 27, 1943. A petition for rehearing filed by petitioner was denied on September

13, 1943 (R. 123). The petition for a writ of certiorari was filed on December 4, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 10 (e) of the National Labor Relations Act.

## QUESTION PRESENTED

The sole question presented is whether the Board, having found that petitioner had interfered with the self-organization of its employees and refused to bargain collectively with a labor organization designated by a majority of the employees in an appropriate unit, may properly order petitioner to bargain with that labor organization, although prior to issuance of the Board's order a sufficient number of the employees who designated the labor organization had left petitioner's employ so that the labor organization was no longer designated by a majority of the employees in the unit.

## STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act are set forth in the Appendix, *infra*, pp. 12–13.

## STATEMENT

Upon the usual proceedings the Board issued its findings of fact, conclusions of law, and order (R. 3–28). The pertinent facts, as found by the

Board and shown by the evidence, may be summarized as follows:[1]

On June 12, 1941, 3 days after a majority of petitioner's employees in an appropriate bargaining unit had designated the Union[2] as their bargaining agent (R. 13–18; 58–59, 68–70, 95–96, 105–106), petitioner informed the Union's representative that it was unwilling to bargain with the Union at that time, and advised him not to seek negotiations with petitioner again for the next 6 months (R. 6–7; 40–41, 43–48, 50–52). During the succeeding week petitioner again stated its refusal to negotiate with the Union's representative (R. 8; 41, 52–53, 90–91). Thereafter the Union filed with the Board a petition for an investigation and certification of representatives, and subsequently entered into an agreement with petitioner for a consent election to be conducted by the Board on July 25, 1941 (R. 9; 66, Bd. Exh. 6). During the week preceding the scheduled election petitioner engaged in a campaign of hostile activities directed against the Union, threatening that if the Union won the election petitioner would close its plant, as a result of which the Union refused to proceed with the election (R. 9–10; 59–60, 73–74, 81–82, 84–89, 98–99, 104, 107, 108). Thereafter peti-

[1] References preceding the semicolons are to the Board's findings; succeeding references are to the supporting evidence.

[2] Amalgamated Clothing Workers of America, affiliated with the Congress of Industrial Organizations.

tioner continued its anti-union activities (R. 10–12; 55–57, 75–80, 82–84, 95). At the hearing before the Trial Examiner petitioner introduced evidence to show that, as of March 5, 1942, a sufficient number of union members had left petitioner's employ so that less than a majority of the employees in the unit were at that time union members (R. 25–26, footnote 24; Resp. Exh. 22, 22–a).

Upon these facts the Board concluded that petitioner had engaged in unfair labor practices within the meaning of Section 8 (1) and (5) of the Act (R. 27). It considered the effect to be given to petitioner's showing that the Union had lost its majority status and determined that nevertheless petitioner should be required to bargain with the Union (R. 25–26, footnote 24). Accordingly the Board entered its order requiring petitioner to cease and desist from its violations of the Act, to bargain collectively with the Union, and to post appropriate notices (R. 27–28).

Thereafter the Board filed its petition for enforcement in the court below and on July 27, 1943, the court handed down its opinion and entered its decree enforcing the Board's order (R. 112–122).

## ARGUMENT

Petitioner's contention that the Board may not require it to bargain with the Union, for the reason that the Union allegedly lost its majority status subsequent to petitioner's original refusal to

bargain with it, and prior to issuance of the Board's order, is without merit. That issue has been settled by this Court. *National Labor Relations Board* v. *P. Lorillard Co.*, 314 U. S. 512; *International Ass'n of Machinists* v. *National Labor Relations Board*, 311 U. S. 72, 82; *National Labor Relations Board* v. *Bradford Dyeing Ass'n*, 310 U. S. 318, 339–340. The court below, following these controlling decisions, properly sustained the Board's order. Its holding presents no conflict of decisions. Indeed the decisions of the Circuit Courts of Appeals adhere to this settled doctrine with marked conformity.[3]

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[3] *National Labor Relations Board* v. *Clinton E. Hobbs Co.*, 132 F. (2d) 249, 252 (C. C. A. 1); *National Labor Relations Board* v. *Somerset Shoe Co.*, 111 F. (2d) 681, 690–691 (C. C. A. 1); *National Labor Relations Board* v. *Reed & Prince Mfg. Co.*, 118 F. (2d) 874, 880 (C. C. A. 1), certiorari denied, 313 U. S. 595; *National Labor Relations Board* v. *The Federbush Co.*, 121 F. (2d) 954, 956 (C. C. A. 2); *National Labor Relations Board* v. *Karp Metal Products Co.*, 134 F. (2d) 954 (C. C. A. 2), bargaining order (42 N. L. R. B. 119, 153–155; 51 N. L. R. B., No. 105) enforced without opinion, October 23, 1943; *National Labor Relations Board* v. *Medo Photo Supply Corp.*, 135 F. (2d) 279, 281 (C. C. A. 2), certiorari granted, No. 265, this Term; *National Labor Relations Board* v. *George P. Pilling & Son*, 119 F. (2d) 32, 39 (C. C. A. 3); *Oughton* v. *National Labor Relations Board*, 118 F. (2d) 486, 498 (C. C. A. 3), certiorari denied, 315 U. S. 797; *National Labor Relations Board* v. *Poultrymen's Service Corp.*, 138 F. (2d) 204, 211 (C. C. A. 3); *National Labor Relations Board* v. *Moltrup Steel Products Co.*, 121 F. (2d) 612, 618 (C. C. A. 3); *National Labor Relations Board* v. *New Era Die Co.*, 118 F. (2d) 500, 505 (C. C. A. 3); *National Labor Relations Board* v. *Highland Park Mfg. Co.*, 110 F. (2d) 632, 640 (C. C. A. 4); *National Labor Relations Board*

In the *Lorillard* case, this Court held that it was the province of the Board, not the courts, to determine whether a shift in the membership of a labor organization subsequent to a refusal to bargain, made an order to bargain collectively with that labor organization inappropriate as a remedy for the effects of the prior unlawful conduct (314 U. S. 512, 513). Contrary to petitioner's contention (Pet. 8–10, 17–19), the Board's findings in the instant case respecting the need for the usual order requiring petitioner to bargain collectively

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v. *Dixie Motor Coach Corp.*, 128 F. (2d) 201, 202 (C. C. A. 5); *National Labor Relations Board* v. *Whittier Mills Co.*, 111 F. (2d) 474, 478 (C. C. A. 5); *National Labor Relations Board* v. *Porcelain Steels, Inc.*, not yet reported, decided November 30, 1943 (C. C. A. 6); *National Labor Relations Board* v. *Burke Machine Tool Co.*, 133 F. (2d) 618, 621 (C. C. A. 6); *National Labor Relations Board* v. *Swift & Co.*, 127 F. (2d) 30, 32 (C. C. A. 6); *National Labor Relations Board* v. *Chicago Apparatus Co.*, 116 F. (2d) 753, 758 (C. C. A. 7); *M. H. Ritzwoller Co.* v. *National Labor Relations Board*, 114 F. (2d) 432, 437–438 (C. C. A. 7); *Valley Mould & Iron Corp.* v. *National Labor Relations Board*, 116 F. (2d) 760, 765 (C. C. A. 7), certiorari denied, 313 U. S. 590; *National Labor Relations Board* v. *The Blanton Co.*, 121 F. (2d) 564, 569 (C. C. A. 8); *Bussmann Mfg. Co.* v. *National Labor Relations Board*, 111 F. (2d) 783, 788 (C. C. A. 8); *National Labor Relations Board* v. *Crown Can Co.*, 138 F. (2d) 263, 267 (C. C. A. 8); *National Labor Relations Board* v. *Wm. Tehel Bottling Co.*, 129 F. (2d) 250, 254 (C. C. A. 8); *Continental Oil Co.* v. *National Labor Relations Board*, 113 F. (2d) 473, 480–481 (C. C. A. 10), certiorari denied in this respect, 311 U. S. 637; *Colorado Fuel & Iron Corp.* v. *National Labor Relations Board*, 121 F. (2d) 165, 175–176 (C. C. A. 10).

were in all material respects the same as those present in the *Lorillard* case (compare R. 25–26 with 16 N. L. R. B. 684, 699–700). As the court below pointed out (R. 118, 121), the Board in effect found that the alleged "loss of majority may be traced to the refusal to bargain * * *," its finding in this respect being implicit in its "treatment of [petitioner's] argument" (R. 121). The court held that the evidence fully sustained this determination of the Board (R. 25–26), for petitioner's

> dilatory tactics, its refusal to recognize the union as a bargaining representative, and its campaign against the union deprived it of the opportunity of strengthening its organization. It demonstrated the union's inability to reach an agreement with the employer with the result that as time went on the enthusiasm of its members waned and made it more difficult for the union to capture the allegiance of other employees, either old employees who had previously not joined or new employees who came on after the unfair labor practices were committed. The Board might reasonably conclude that had the union been recognized and installed as bargaining representative of the employees, as the law required, it probably would have retained its majority status by accessions from these sources, despite its loss of members resulting from normal labor turn-over. (R. 121.)

Thus the court gave effect to the common-sense view that, since employees join labor organizations to obtain collective bargaining, the factor normally decisive of a union's ability to secure and retain members is whether or not the employer bargains with the union. *International Ass'n of Machinists* v. *National Labor Relations Board*, 311 U. S. 72, 82; *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261, 271. And it is an equally well-settled corollary of this view that it is within the Board's discretion to determine that a union's loss of majority, which, as here, is traceable to the employer's unfair labor practices, should not be used by the employer as a shield against a bargaining order. To hold otherwise would prevent the Board from remedying the unfair labor practices of an employer whose violations of the Act were sufficiently flagrant to destroy the union's majority membership.

Petitioner's contention (Pet. 7–8, 12–17) that the decision below fails to follow *National Labor Relations Board* v. *Fansteel Metallurgical Corp.* (306 U. S. 240, 261–262), is without merit. The intervening unlawful acts of the union members in the *Fansteel* case, which furnished a lawful ground for the employer's discharge of the bulk of the union membership, distinguish that case. In the instant case there was no intervening circumstance which would warrant the assumption that

the Union would have lost its majority regardless of the occurrence of the unfair labor practices. On the contrary, as both the Board and the court below recognized, there was a clear causal connection between the unfair labor practices here and the succeeding alleged loss of the Union's majority (*supra*, p. 7). The fact that the alleged loss of the Union's majority may have been caused by the withdrawal of union members from petitioner's employ rather than by the withdrawal of employees from membership in the Union is a technical difference without legal significance. One case, as the court below properly held, is as clearly within the rule of the *Lorillard* decision as is the other. Three recent circuit court decisions squarely support the court below in this respect. *National Labor Relations Board* v. *Clinton E. Hobbs Co.*, 132 F. (2d) 249, 252 (C. C. A. 1); *National Labor Relations Board* v. *Burke Machine Tool Co.*, 133 F. (2d) 618, 621 (C. C. A. 6); *National Labor Relations Board* v. *Porcelain Steels, Inc.*, not yet reported, decided November 30, 1943 (C. C. A. 6). The courts in each of these cases, relying upon the authority of this Court's decisions in the *Lorillard*, *Machinists*, and *Bradford Dyeing* cases (*supra*), enforced the Board's bargaining order despite the employer's contention that subsequent to the refusal to bargain the union had lost its majority due to a normal turn-over in employee personnel. In the *Burke Machine Tool* decision the court de-

clared that "the Board was entitled to conclude * * * that such loss could not be separated from the unfair labor practices" (133 F. (2d) at p. 621). And in the *Porcelain Steels* decision the court specifically approved the Board's inference that "except for the unfair labor practices * * * the Union 'would have been able to recruit from among the new employees a sufficient number to maintain its majority.'" These observations apply with equal propriety to the instant case.

And in the case of *National Labor Relations Board* v. *Karp Metal Products Co., Inc.*, 134 F. (2d) 954 (C. C. A. 2) upon which petitioner relies (Pet. 10), the court subsequently enforced an order to bargain collectively despite a turn-over in the employer's personnel which probably removed the union's majority (42 N. L. R. B. 119, 153–155; 52 N. L. R. B., No. 105, enforced without opinion, October 23, 1943).

Petitioner's reliance upon *National Labor Relations Board* v. *Ohio Calcium Co.*, 133 F. (2d) 721 (C. C. A. 6) (Pet. 11–12) is misplaced. That case is not in point since there the loss of majority, unlike the alleged loss in the instant case, *preceded* the refusal to bargain and obviously could not have been caused by it.

## CONCLUSION

The decision below is correct and presents no conflict of decisions or question of general im-

portance warranting review. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

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DECEMBER 1943.

## APPENDIX

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, 49 Stat. 449, 29 U. S. C., Sec. 151, *et seq.*) are as follows:

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

* * * * *

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9 (a).

* * * * * *

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided,* That any individual employee or a group of employees shall have the right at any time to present grievances to their employer.

* * * * *

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. * * *

* * * * *

(c) * * * If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. * * *

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